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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JAMES KELLY NORTON, Defendant and Appellant.	B289556 (Los Angeles County Super. Ct. No. KA024346)

APPEAL from a judgment of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Jonathan B. Steiner and Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Nicholas J. Webster and Nikhil Cooper, Deputy Attorneys General, for Plaintiff and Respondent.

In this appeal from the trial court's denial of defendant James Kelly Norton (defendant's) petition for recall of sentence pursuant to Proposition 36, defendant advances an argument that has been unanimously rejected by various published Court of Appeal decisions: that "armed" "during the commission of the current offense," as used in a statutory provision that makes a petitioning defendant ineligible for Proposition 36 relief, means the firearm must have been used to facilitate a crime rather than being available for offensive or defensive use at the time the crime is committed. Following published authority, we reject defendant's argument.

I. BACKGROUND

In September 1994, police stopped defendant for speeding. During the traffic stop, defendant consented to a pat-down search and told the officer that there was a gun magazine clip in his pocket and an unloaded firearm in the glove compartment, which he had placed there. The officer recovered the gun and arrested defendant for being a felon in possession of a firearm (Former Pen. Code,[1] § 12021, subd. (a)(1)).

At a trial held early in 1995, a jury found defendant guilty of the felon-in-possession charge. The jury further found defendant had sustained two prior serious or violent felony convictions within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12). The trial court sentenced defendant to 25 years to life in prison, the alternative sentence required by the Three Strikes law.

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[1] Undesignated statutory references that follow are to the Penal Code.

Years later, defendant petitioned to recall the Three Strikes sentence he received in the 1995 felon-in-possession case pursuant to section 1170.126, a statute enacted as part of Proposition 36, the Three Strikes Reform Act of 2012. The trial court ordered the People to show cause why defendant was not entitled to the relief requested.

The People opposed defendant's petition, arguing he was ineligible for Proposition 36 relief because he had a handgun in the glove compartment of his car (with the gun's magazine in his pocket) when stopped by the police—establishing, in the People's view, that he had "ready access" to the gun and was therefore armed during the commission of the commitment offense within the meaning of the relevant statutory provisions. (§§ 1170.126, subd. (e)(2), 667, subd. (e)(2)(C)(iii) [petitioner ineligible for Proposition 36 relief if "[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person"].) At a later hearing, the trial court agreed, finding beyond a reasonable doubt that defendant was ineligible for relief pursuant to section 1170.126, subdivision (e)(2), for having been armed with the firearm during the commission of the offense triggering his Three Strikes sentence.

II. DISCUSSION

Many cases have held that being armed with a firearm for purposes of determining Proposition 36 eligibility means having a firearm "available for use, either offensively or defensively." (See, e.g., *People v. White* (2014) 223 Cal.App.4th 512, 524; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1051-1052 (*Blakely*).) Here, defendant had a magazine clip in his pocket and the

corresponding gun within arm's reach when he was stopped by the police and arrested for possessing the firearm. The parties do not dispute these factual circumstances establish the gun was readily available for defendant's offensive or defensive use.

Rather, the dispute is over the meaning of the pertinent eligibility provisions in sections 1170.126 and 667 concerning those who are armed with a firearm during the commission of the offense in question. Defendant contends "the factors listed in subdivision [(e)(2)(C)](iii) [of section 667] must attach to the current offense as an addition and not just be an element of the current offense." In other words, he believes "the arming and the offense [must] be separate, but 'tethered,' such that the availability of the weapon facilitates the commission of the offense [i.e., a so-called facilitative nexus]" rather than simply having a "temporal nexus" to the offense (i.e., that the weapon is readily available at the time the offense is committed).

The interpretive theory defendant advances, including many and perhaps all of the individual reasons his appellate briefing offers in support of it, has been soundly rejected in prior published decisions. (See, e.g., *People v. Frutoz* (2017) 8 Cal.App.5th 171, 177-178 (*Frutoz*); *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284 (*Hicks*); *People v. Brimmer* (2014) 230 Cal.App.4th 782, 797-799 (*Brimmer*); *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1314 (*Elder*); *Blakely*, *supra*, 225 Cal.App.4th at pp. 1051-1052).) He contends, for instance, that the electorate would have been more explicit had it meant to bar eligibility for all gun possession crimes. This argument has been persuasively rejected in published cases. (See, e.g., *Hicks*, *supra*, at pp. 283-294; *Elder*, *supra*, at pp. 1312-1313; see also *People v. Estrada* (2017) 3 Cal.5th 661, 670 ["Although the need to

establish such a [temporal] nexus imposes certain limits on the applicability of the firearm-related exception, the Act could certainly have imposed an even stricter requirement for triggering the exception. (See *People v. Bland* (1995) 10 Cal.4th 991, 1002[ ] [interpreting the phrase "'in the commission'" to impose a "'facilitative nexus'" requirement].) Because the Act does not do so, we may infer some kind of temporal limitation on the retroactive application of section 1170.12, subdivision (c)(2)(C)(iii)"].) He argues "basic principles of grammar" support the interpretive conclusion he draws, but this argument was persuasively rejected in *Frutoz*, *supra*, 8 Cal.App.5th at pages 178-179. He asserts there is no meaningful difference between section 667, subdivision (e)(2)(C)(iii)'s use of "[d]uring the commission" versus other statutes that use "in the commission," but this point too has been rejected. (See, e.g., *Frutoz*, *supra*, at pp. 177-178; *Brimmer*, *supra*, at pp. 798-799.) He also points to the purposes animating passage of Proposition 36, but this is equally unpersuasive for reasons discussed in the published cases. (See, e.g., *Blakely*, *supra*, at pp. 1054-1057.)

Following the cases we have discussed (not to mention others we have found it unnecessary to cite), we hold the trial court correctly denied defendant's petition for recall of sentence.

DISPOSITION

The trial court's order is affirmed.

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BAKER, Acting P. J.

We concur:

KIM, J.

SEIGLE, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.